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No. 99-886

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TOWN BOARD OF THE TOWN OF HEMPSTEAD, NEW YORK, *et al.*,

Petitioners,

v.

DOROTHY GOOSBY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

FREDERICK K. BREWINGTON
LAW OFFICES OF
FREDERICK K. BREWINGTON
50 Clinton Street, Suite 501
Hempstead, NY 11550
(516) 489-6959

RANDOLPH M. SCOTT-MCLAUGHLIN
Counsel of Record
78 North Broadway
White Plains, NY 10603
(914) 422-4340

RICHARD HAMBURGER
DAVID N. YAFFE
HAMBURGER, MAXSON & YAFFE, LLP
225 Broadhollow Road, Suite 404W
Melville, NY 11747
(631) 694-2400

Attorneys for Respondents

156942

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

4/3pp

COUNTER-QUESTIONS PRESENTED

After hearing 11 days of testimony and reviewing hundreds of pages of exhibits, District Court Judge John Gleeson issued a 65-page decision in which he stated:

> In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic subdistricts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogenous population consisting of many different communities and voices, I conclude that the black citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics. Rather, black citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to elections and the slating of candidates for them are not equally open to the participation of blacks.
>
> * * *
>
> Having conducted the careful and searching appraisal mandated by Section 2 [of the Voting Rights Act], I have a definite and firm conviction that the at-large scheme employed for Town Board elections in Hempstead has operated to invidiously exclude blacks from effective

> participation in political life in violation of Section 2 [of the Voting Rights Act].

(Pet. 129a-132a).[1]

As a remedy, Judge Gleeson directed the Town be divided into six council manic districts, one of which would have a black voter majority (Pet. 132a).

The questions presented are:

1. Did the district court properly apply the tests enunciated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), in its assessment of the evidence of white bloc voting and the evidence of partisanship?

2. Were the district court's factual findings of "legally significant white bloc voting" and of "vote dilution" clearly erroneous?

3. Did the district court properly reject, as unconstitutional, Petitioners' alternative remedial plan which proposed dividing the Town of Hempstead into one "white" district which would elect five Town Board members and one "black" district which would elect one Town Board member?

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1. Numbers preceded by "A" refer to page numbers in the Joint Appendix. Numbers preceded by "T" refer to page numbers in the trial transcript. Numbers preceded by "E" refer to trial exhibits. Numbers preceded by "Pet." refer to pages of Petitioners' Petition for a Writ of Certiorari.

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Appendix — Excerpts From The May 1982 Senate Judiciary Committee Report On The Voting Rights Act Amendments Of 1982 (S. Rep. No. 417, 97th Cong., 2d Sess., At 28-30 [1982]) 1a

LEGISLATIVE HISTORY INVOLVED

Missing from Petitioners' certiorari petition is citation to the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act. *See* S. Rep. No. 417, 97th Cong., 2d Sess., at 28-30 (1982). In *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (citations and internal quotes omitted), this Court observed that, "[t]he Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations." Throughout this Court's analysis of the district court's decision in *Gingles* it repeatedly referred to and relied on the accompanying Senate Report factors and *rejected* the government's argument that "little weight" should be given to the Senate Report. *See* 478 U.S. at 43, n.7. The factors contained in the Senate Report are provided in the Appendix to this Brief at 1a.

COUNTER-STATEMENT OF THE CASE

Petitioners seek to convince this Court that their appeal somehow presents a legal issue over which there is disagreement amongst the Circuit Courts. They fashion this argument by ignoring the fact intensive, functional inquiry necessarily conducted by the District Court in concluding that the challenged at-large electoral system diluted Respondents' rights in violation of § 2 of the Voting Rights Act, and, attempting to evade the "clearly erroneous" test governing appellate review of that conclusion (*see Gingles*, 478 U.S. at 78-80). Because Petitioners have all but obfuscated the District Court's carefully detailed and fully supported findings and because those findings decisively annihilate Petitioners' underlying representation to this Court that partisan affiliation, as opposed to race, caused blacks to be excluded from effective political participation in Hempstead, we provide a comprehensive explication of those findings.

A. The Nature Of The Case And The Evidence At Trial.

Respondents, a certified class of all registered black voters in the Town of Hempstead, brought this action maintaining that the at-large voting system for membership on the Town Board diluted and submerged their votes into the larger white community, thereby assuring continued lack of representation (A22). Petitioner Town Board is the legislative body for the Town of Hempstead which has 2,400 employees and an annual budget of $290 million (T1445). The Town Board's responsibilities include zoning, parks and recreation, planning and economic development, sanitation, road maintenance, street lights, water supply, tax collection, environmental conservation, building code violations, public safety, senior citizens services and occupational resources (T1295-1314). Its numerous departments include the Public Safety Department, the Department of Sanitation, the Department of Water, the Department of Parks and Recreation, the Department of Senior Enrichment, the Department of Planning and Economic Development, the Department of General Services, the Department of Highways, the Department of Industry and Commerce, the Department of Conservation and Waterways, the Department of Occupational Resources, and the Department of Buildings (Pet. 67a).

The 1990 census showed the Town had a total population of 725,639 (12.1 percent black and 83 percent white). (Pet. 64a). Yet, from 1907 to 1993, no black candidate has ever been elected to the Town Board (Pet. 98a) and that 1993 candidate was not the candidate of choice of the black community (Pet. 80a).

The trial was held before Judge Gleeson and proceeded for 11 full trial days (2,116 pages of trial transcript). Three experts and 14 fact witnesses testified for Respondents and one expert and six fact witnesses testified for Petitioners.[2] Closing arguments lasted an entire day (T1974-2116).

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2. Respondents' fact witnesses were: Samuel Prioleau (T45-67) (black Democrat, former school teacher, and community activist); David

(Cont'd)

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Ford (T545-83) (former black Republican and Democratic candidate for Hempstead Town Board); Lance D. Clark (T623-50) (black Republican, Deputy Mayor for the Village of Hempstead, Republican committeeman); Earlwin Warren (T666-97) (black Republican, former Republican committeeman, Town of Hempstead employee and victim of racial discrimination in employment); Andrew Hardwick (T707-30) (black Republican, former candidate for the 18th Assembly District located in the Town of Hempstead); Peter LeMonier (T740-82) (black Republican, Republican Executive Leader from Lakeview, Deputy Commissioner for the Town Parks and Recreation Department, member of African-American Republican Coalition ["AARC"]); Barry DelMastro (T796-839) (white Democrat, former Hempstead Town Democratic Chair, Democratic candidate for Hempstead Town Board); John Matthews (T879-908) (white Democrat, former Chair of Nassau County Democratic Committee, former Commissioner of Nassau County Board of Elections, former Democratic candidate for Congress in the 5th Congressional District); Diana Coleman (T953-83) (black Democrat, community activist, Chair of Roosevelt Community Service Program); Melvin Boone (T996-1013) (black Republican, Nassau County Police Department detective); San Salvadore Bloomfield (T1027-57) (former black Republican, Town employee, and successful plaintiff in federal employment discrimination case against the Town of Hempstead); Hazel N. Dukes (T1057-78) (black Democrat, President of New York State Conference of the NAACP); Vivien DeJong (T1090-1118) (white Democrat, former candidate for Town Board); and Betty McAllister (T1952-67) (black Republican, community activist).

Petitioners' fact witnesses were: Robert Francis (T1168-1216) (black Republican, Commissioner, Department of Planning and Economic Development in the Town of Hempstead, Republican Executive Leader from Roosevelt, member, African-American Republican Coalition); Gregory Peterson (T1287-1355) (white Republican, Supervisor, Town of Hempstead, Republican Executive Leader, East Meadow); Kendall W. Lampkin (T1465-85) (black Republican, Executive Assistant to the Supervisor, Town of Hempstead); Briding Newell (T1652-66) (black Republican, Senior Research Analyst, Nassau County Legislature, former Commissioner, Town of Hempstead Department of Drug & Alcohol); Curtis Fisher (T1743-79) (black Republican, Town Board member, former Executive Assistant to the Town Board of the Town of Hempstead); and Honorable Alfred Robbins (T1896-1918) (black Republican, retired New York State Supreme Court Justice, County of Nassau).

B. The District Court's Liability Findings Of Fact.

Following *Gingles*, Judge Gleeson found (Pet. 57a-134a) that Respondents had met their burden of proof with respect to the three *Gingles* preconditions. As recited by this Court:

> First, the plaintiffs must show that the minority group is sufficiently large and geographically concentrated such that it could constitute a majority in a single-member district. Second, the minority group must show that it is politically cohesive. Third, the plaintiffs must demonstrate that the "white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances . . . — usually to defeat the minority's preferred candidate."

Gingles, 478 U.S. at 50-51.

1. The *Gingles*' Preconditions.

a. The First *Gingles* Precondition: A Sufficiently Large And Geographically Compact Minority Group.

Judge Gleeson found and it is undisputed that the black community in the Town is sufficiently large and geographically compact such that it could constitute a majority in a single-member district (Pet. 110a-112a). Dr. Andrew Beveridge, Respondent's expert in the field of districting, prepared a map containing six single-member districts and demonstrated that it was possible to create one majority black district in the Town of Hempstead (Pet. 68a-69a, 133a). He was able to draw a single-member district plan adhering to the one person-one vote standard, equal population size, compactness, preservation of political geography and, as a subordinate consideration, the creation of a majority-minority district (Pet. 68a-69a). He was able to attain fairly equivalent populations among districts, the ideal population size per district being 120,000 (Pet. 68a-69a; T154).

b. The Second *Gingles* Precondition: Political Cohesion Of The Minority Group.

Judge Gleeson found, and the Town conceded (Pet. 116a), that "[t]here is no dispute that the black voters in the Town are politically cohesive" and that blacks in the proposed majority-minority district have the potential to elect their preferred candidate (Pet. 72a). Both parties' racial bloc voting experts concluded that there was a persistent pattern of racially polarized voting in elections for the Town Board and that African-American voters voted cohesively (T357-59; A1500-1501; A1516-17). In all seven Town Board elections from 1983 through 1993 blacks and whites voted for different candidates (T350-55; E86; E87).

c. The Third *Gingles'* Precondition: Legally Significant White Bloc Voting.

Judge Gleeson found that Respondents had established "legally significant white bloc voting" by virtue of the fact that the white majority in Town voted sufficiently as a bloc to enable it to always defeat the minority preferred candidate (Pet. 116a-118a). Each of the analyzed Town Board elections exhibited racially polarized voting (Pet. 78a-80a) and in every Town Board election from 1983 through 1993, the white voting majority did not prefer any candidate who was among the preferred candidates of black voters (T337-359, T1500-1501, T1516-17, T1565). Black voters had never been able to elect their preferred candidate to the Town Board (T340-41; E79).

In every election for Town Board, the majority of white voters withheld their votes from the minority-preferred candidate. The district court also observed that every minority-preferred candidate for Town Board lost to the majority preferred candidate as a result of white voters voting for candidates the black voters did not support. *Id.* The court concluded that "there is a persistent pattern of racially polarized voting in Town Board elections that consistently has resulted (and will result in the future) in the defeat of the minority-preferred candidate" (Pet. 118a).

While Petitioners did not seriously contest the existence of racial polarization in voting patterns (Pet. 82a), they maintained that the racial polarization in the election results lacked "legal significance" because of the existence of partisan polarization in the elections. The district court determined that the inquiry into this issue was properly to be performed in its totality of circumstances analysis (Pet. 128a).

2. The Totality Of Circumstances And The Senate Report Factors.

a. Access to the Candidate Slating Process.[3]

The court found that blacks had been denied access to the Republican Party slating process for Town Board elections (Pet. 89a, 92a-93a). It noted that there existed a formal procedure for selecting Republican candidates for Town Board and other elective offices; the county chair would recommend a candidate to the executive committee, consisting of the executive leaders of the party, which would vote on whether to recommend that individual to the party's convention, and the convention would then vote on the recommendation (Pet. 87a). However, the court found, the executive committee always and unanimously recommends the county chairman's selection to the convention, which *always* and *unanimously* accepts those recommendations (Pet. 87a).[4] There has never been a party primary for a nomination to the Town Board and for nearly a century, every Town Board member has been a Republican (Pet. 86a).

3. The Senate Report identified the following as probative of a Section 2 Violation: If there is a candidate slating process, whether members of the minority group have been denied access to that process. S. Rep. at 29, 1982 U.S.C.C.A.N. at 206.

4. Bruce A. Blakeman, then Town Board member whose affidavit was placed in the record by Petitioners, could not recall a single instance where more than one individual was nominated for an elective office at a convention (E232-33). Similarly, Patrick A. Zagarino, a member of the Town Board, and a defendant in this case, stated that he could not recall a single instance when the executive committee of the Republican Party of the Town voted in favor of an individual for town office and that individual did not receive the vote of the convention (E261).

The Republican Party had acceded to the desire of prominent black Republicans, notably the Nassau County African-American Republican Coalition ("AARC"), to have blacks nominated as candidates for seats in mainly majority-minority districts, such as in the 18th A.D., or judicial districts (A1076). However, the court found that the Town Board and the Republican party had *not* been as receptive to the idea that a black should occupy a seat on the Town Board (Pet. 89a).[5] With the sole exception of Curtis Fisher, the Republican party has never nominated a black person for Town Board (Pet. 89a).

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5. Town Board Supervisor Peterson, a defendant in this case, testified that when vacancies arose on the Board in 1989, certain black Republican leaders had not asked that an African-American be appointed to those positions (T1406-1407). However, members of the African-American community had protested and marched on Town Hall seeking representation at that time (T1400-1401). Peterson stated that he believed there were qualified African-Americans for those positions (T1401-02).

Briding Newell, Petitioner's witness, an African-American involved in AARC and an executive assistant from 1983-1989 to the Town Board's Supervisor, testified that she was never asked by the Republican Party to run for the Town Board (T1670). Newell stated that AARC had lobbied intensely for African-American representation from 1983 to the time Fisher was nominated to the Board (T1684). However, in 1993 when a vacancy arose, AARC did not support Fisher's nomination. Newell testified that Lance Clark was their choice because of his years of involvement in the party contrasted with that of Fisher (T1668-1669).

Robert Francis, an African-American Executive Leader in Roosevelt, a member of the Coalition and also a witness for Petitioners, testified that years prior to Fisher's appointment he had sought the support of Joseph Mondello, the party Chairman, and then Town Supervisor, in order to get African-American representation on the Board (T1204-1205). Nevertheless, Francis stated that AARC had never recommended an individual for a position on the Town Board prior to Lance Clark (T1204). Upon examination by the court, Francis agreed that when Mondello designated a candidate for the Board it was just assumed that person would be elected (T1204).

The court observed that in 1987, two vacancies arose on the Board and two whites were appointed to fill those vacancies (Pet. 89a). In 1989, two more vacancies arose. Blacks, including members of AARC, marched on Town Hall to pressure the party leaders to nominate a black Republican. Despite these efforts, once again two whites were nominated to fill those vacancies (Pet. 89a). At the time of these appointments, Joseph Mondello, the Republican Party chairman who had control over the nomination process, was also the Presiding Supervisor of the Town (Pet. 89a).

In 1993, another vacancy arose on the Board. AARC recommended Lance Clark, a black attorney who was Deputy Mayor of the Village of Hempstead, a Republican committeeman in the Village for 14 years and an active member in the black community (Pet. 90a). However, Clark was not even interviewed for the position (Pet. 90a). Instead, Mondello nominated his tennis partner, Curtis Fisher, who did not live in any of the black communities in the Town (Pet. 90a). Fisher had been considered by AARC, but had been found less qualified to represent the black community (Pet. 91a).

Based on these facts, the court found that the slating process for Town Board used by the Republican Party was not truly open to blacks, noting that when the Republican Party had the opportunity to nominate a minority-preferred Republican candidate, the party leader chose to ignore the recommendation of prominent black Republicans and handpick a "safe" black Republican (Pet. 93a). In reaching the conclusion that Fisher was a "safe" candidate, Judge Gleeson had the opportunity to evaluate Fisher's testimony, including his demeanor, his candor or lack of candor, his self-interest, and his overall credibility.

b. Racial Appeals in Campaigning.[6]

Judge Gleeson found that there "was a pattern of Republican campaign materials that were characterized by subtle racial

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6. The Senate Report identified the following factor as probative of a Section 2 Violation: Whether political campaigns have been (Cont'd)

appeals, which sought to depict the integration of white areas as a threat, and to prey on the fear of such a threat" (Pet. 97a-98a). Petitioners completely ignore this finding, maintaining in their Petition that "[t]he election results for Council members unequivocally demonstrate that race plays no role in the election of candidates to the Board." App. 2.

As John Matthews, a white Democrat, former Chair of the Nassau County Democratic Committee, and former Commissioner of the Nassau County Board of Elections, testified:

> Q. Now, with respect to the town elections or elections within the town, to what do you attribute the loss of [races by] Democrats?
>
> * * *
>
> A. I thought that over the years there was a, what's to be [sic] racist undertones to the campaign that the Republican Party ran against the Democratic Party in the Town of Hempstead.
>
> Q. What do you mean by racial overtones or undertones?
>
> A. Undertones. It always seemed to me that the Republican Party preyed on the fears of white people. It seemed that the literature that I remembered, vacant dumps and vacant lots with garbage strewn on it with phrases such as don't let New York City come to Nassau County, don't citify Nassau County, keep the city out of our county, and those were the campaigns year in and year out which has an undercurrent of what we call playing the race card (T891-92).

Matthews responded, as follows, when asked whether race played a role in party politics in the Town:

(Cont'd)
characterized by overt or subtle racial appeals. S. Rep. at 29, 1982 U.S.C.C.A.N. at 206.

I think that race has a great deal to do with party politics in Nassau County. The Democratic Party is perceived to be a party of liberal Jews and Blacks and the Republican Party is perceived to be a party of christians, Italians and Irish . . . (T897).[7]

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7. Additional testimony on the pattern of racial appeals by Republicans came from Barry DelMastro, a white Democrat, former Republican, former Hempstead Town Democratic Chair, and candidate for Town Board, who testified as follows:

Q. Have you ever heard the phrase keep the suburb[s] the suburb[s]?

A. Yes, I have.

Q. Have you heard it used in election campaigns?

A. Yes.

* * *

Q. From your recollection of hearing the phrase, who has used it, Democrats or Republicans?

* * *

A. Always Republican.

* * *

Q. What impressions did you draw from the phrase keep the suburbs the suburbs?

A. Let's keep everything status quo and let's keep the neighborhoods white.

* * *

Q. You also used the term playing the race card?

A. Yes, sir.

* * *

Q. What does playing the race card mean to you?

A. Playing the race card is invoking fear in the hearts and minds of voters that if you wind up voting for the opposition that you'll see significant number of either African Americans coming in or they'll be bused into your schools or something to that effect that would try to evoke the fear in somebody's heart and mind that vote — for them to vote for that particular individual or that group of people.

Yet another example of the use of racial appeals was the campaign literature used by incumbent Republican state senator Skelos from the Town in his campaign during the 1970s. The court found that Skelos had appealed to the fears of Town residents that black students from Queens would be bused to schools in the Town, using campaign literature which included photographs of black children in school buses. The court concluded that the intent of this literature was to convey the message to Town voters that a vote for a Democratic candidate would result in busing of school children for integration purposes (Pet. 95a).[8]

Additionally, the court concluded that a Town Board member, Joseph Cairo, used campaign literature that sought to appeal to anti-black sentiments and to play on the fears of certain Town residents about the influx of black residents from Queens into the Town (Pet. 95a-96a; E.332-335). In his literature Cairo claimed to be the unofficial liaison to the Nassau County Police Department, and that he had sensitized local patrolmen to the "special needs" of the community (Pet. 96a-97a). On this issue, the court credited the testimony of Melvin Boone, a Republican and detective in the Nassau County Police Department. Detective Boone testified to a practice in the Department whereby patrol officers were to keep Queens blacks out of the border neighborhoods, and that border patrols were conducted (Pet. 96a-97a). The court concluded that Cairo's campaign

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8. In this regard, DelMastro testified as follows:

> Over time I've seen one particular instance down in the Five Towns area I know when Carol Berman was running for reelection for state senate that there were pictures of school buses, drawings of school buses with black children in that particular campaign literature.
>
> Q. What impressions did you see seeing black children in those school buses?
>
> A. That Republicans were trying to say if you vote for this Democrat that you will wind up having black children bused in from Queens (A871-72).

literature was perceived, reasonably, as a promise to stem the tide of blacks across the Queens border into Elmont and North Valley Stream (Pet. 97a-98a).[9] The court further found that "the Town Board — perhaps through Cairo himself — used its unofficial influence over the police department to further this goal" (Pet. 97a). Cairo did not testify at the trial.

c. Responsiveness by Elected Officials To Minority Needs.[10]

The district court concluded that the Town Board is unresponsive to the particularized needs of the black

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9. DelMastro testified concerning the phrases used in Cairo's campaign literature, as follows:

> Q. I would like you to read the paragraph that follows. I quote, "Joe Cairo is well aware of his community's proximity to the City of New York. The location is an ideal one but it also puts the area at risk of urbanization. Accordingly, Councilman Cairo has been a major opponent of those who seek to 'Queensify' North Valley Stream and its environs."
>
> What impressions, if any, did you get from these various statement I read to you?
>
> A. Here again, I think it is somewhat beyond subtle and I think pretty much it is coming out and saying we are going to stop those people from moving in.
>
> Q. You say "those people"?
>
> A. Those people. Those people of color from moving in.

During the period of time when Cairo used this literature containing racial appeals, black residents from Queens were moving into the formerly predominantly white sections of Elmont and North Valley Stream (Pet. 96a). This influx resulted in racial tensions in the Town (*Id.*).

10. An additional factor found by the Senate Judiciary Committee to have probative value was whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207. The Senate Report observed that:

(Cont'd)

communities in the Town (Pet. 99a). Although then Town Supervisor Peterson testified that the Town had an affirmative action policy, in fact, there was no such policy in place (Pet. 100a). Instead there was only a policy against overt racial animus (Pet. 100a; T1449-51; T1889-90). Fisher, who had been the affirmative action officer for the Town, had received no training for that position and was not familiar with anti-discrimination laws (Pet. 100a-101a).

In finding that the anti-racial slur policy was itself not taken seriously by the Town Board, the court relied on the testimony of Earlwin Warren and San Salvadore Bloomfield, both African-Americans. Warren, a Republican committee member in the Town who worked actively for the party and was employed in the Town's Department of Sanitation, testified about how he had been mistreated with respect to work assignments and the use of racial epithets and other verbal abuse.

Although Fisher concluded that Warren had been subjected to racial discrimination in the Department, including being called a "nigger" by a Town co-worker in a Town workplace, he never bothered to explore discipline of the offending employee (Pet. 101a). Additionally, there was no sensitivity training instituted for Department employees, Fisher never made any report to the Board regarding this incident, and Warren was prevented from concluding his remarks when he tried to directly raise this issue with the Board. *Id.*

Bloomfield, a member of the Uniondale Republican club and a master carpenter hired by the Town as a seasonal laborer, complained to then Affirmative Action Officer Fisher that he

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(Cont'd)

> Unresponsiveness is not an essential part of plaintiff's case. . . . Therefore, defendant's proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process.

S. Rep. at 29, n.116, 1982 U.S.C.C.A.N. at 207, n.116.

was unjustifiably passed over for appointment and promotion by two less qualified whites. Fisher spoke to the Town's Personnel Director, but advised Bloomfield that there was nothing he could do about the problem (Pet. 102a). Even after Bloomfield won a judgment against the Town in connection with this matter, the Board took no action, and declined to provide any sensitivity training to Town employees in that department (Pet. 102a).

The court found other examples of a lack of responsiveness in that the African-American residents of Lakeview and Uniondale, and the black community in Elmont had all been denied funding for community centers (Pet. 103a), the commercial center of Roosevelt, a predominantly black area, had been allowed to deteriorate without any recommendations from Fisher (Pet. 103a-104a), and the Town took no action upon learning that a trophy on display in the Freeport Volunteer Fire Department bore the inscription of the Ku Klux Klan (Pet. 102a).

Based on the evidence in the record, the court was of the opinion that Petitioners had

> established indifference and callousness on the part of the Town Board with respect to the issue that probably matters most to blacks: racial intolerance and bigotry in Town government itself. It is a government that, in all seriousness regards a prohibition against overt racial animus as affirmative action, and even when such animus is brought to its attention, takes no action at all

(Pet. 105a).

d. History Of Official Discrimination.[11]

Judge Gleeson concluded that there was no official policy of discrimination against blacks in the Town (Pet. 82a), however,

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11. In the Senate Judiciary Committee Report the following factor was identified as probative of a Section 2 violation: The extent of *any* history of official discrimination *in* the state or political subdivision (Cont'd)

he found that the purging of voters from the voting rolls of Nassau County[12] (in which Hempstead is located) had a discriminatory impact on black voters and was an appropriate consideration in evaluating the totality of circumstances (Pet. 83a). The affidavit of Dr. Alan Lichtman (T419-21) demonstrated that African-American registrants in Assembly District 18, which is virtually geographically identical to Respondents' proposed majority-minority district (E6), were more than twice as likely to be purged as white registrants in that district (E13-14). Furthermore, there was a higher rate of purge in minority districts than in white districts (E15).

e. Electoral Mechanisms That Enhance Vote Dilution.[13]

Judge Gleeson found that the unusually large size of the Town and the prohibition against cumulative voting significantly reduced the chances of minority electoral success (Pet. 85a-86a). The size of the Town made campaigning a daunting prospect according to both black Republicans and black and white

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that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process. S. Rep. No. 417, 97th Cong., 2d Sess., at 28 (1982) (footnotes omitted) ("S. Rep."), *reprinted in* 1982 U.S.C.C.A.N. 177, 206 (emphasis added).

12. Under Section 5-406 of the New York Election Law, voters who had failed to vote for four successive years were purged from the rolls. The purging of voters in Nassau County continued until 1990 when in *NAACP v. Nassau County Board of Elections*, CV 90-0306 (Sifton), the Eastern District Court of New York issued a restraining order preventing the defendants therein from continuing to purge voters in Nassau County because of the disparate racial impact of the purge (E289-90; Pet. 84a).

13. The Senate Report identified the following factor as probative of a Section 2 violation: The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group. S. Rep. at 29, 1982 U.S.C.C.A.N. at 206.

Democrats who testified at the trial (A1074). The court also found that the difficulties faced by black candidates in Town-wide elections contrasted sharply with their ability to achieve electoral success in smaller districts, such as the 18th A.D. and the Nassau County legislative districts (Pet. 86a).

f. Minorities Elected to Public Office.

With the exception of the nomination and election of Fisher to Town Board, all of the other members of the Board from 1907 to 1993 were white Republicans (Pet. 98a). Blacks had been appointed or elected to judicial positions, had served in governmental positions in the majority-minority villages of Hempstead and Freeport, and as commissioners in Town government; however, the court was critically moved by the fact that "until the election of Curtis Fisher in 1993, no African-American was ever elected to the legislative body at issue in this case" (Pet. 98a-99a).[14] The court agreed with Respondents that Fisher was selected because he was a "safe" minority candidate (Pet. 99a).[15]

g. Tenuousness Of The Policy Underlying At-Large Elections.[16]

The court determined that the "policy" underlying the at-large voting structure was weak and weighed in favor of

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14. In the Senate Judiciary Committee Report the following factor was identified as probative of a Section 2 violation: the extent to which members of the minority group have been elected to office. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207.

15. The Senate Report acknowledged that white citizens might seek to evade the reach of Section 2 by manipulating the election of a safe minority candidate. S. Rep. at 29, n.115, 1982 U.S.C.C.A.N. at 207, n.115.

16. An additional factor found by the Senate to have probative value with respect to a plaintiff's evidence of a violation is: whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207. The Senate Report observed that "even a consistently applied practice

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Respondents. It specifically rejected Petitioners' argument that an at-large elected body represents everyone in the Town. In fact, the evidence revealed that the Town was so large that the Board had already created *de facto* districts, assigning primary responsibility for areas in the Town to particular Board members (Pet. 108a). The court was of the opinion that this *de facto* districting undermined the Petitioners' arguments and demonstrated that the Town was too big and diverse for its governing body to be elected at-large (Pet. 108a).

h. Political Partisanship.

The district court noted that while Petitioners did not seriously contest the existence of racial polarization in voting patterns (Pet. 82a), they contended that the racial polarization in the election results lacked "legal significance" because of the existence of partisan polarization in the elections. *Id.*

The evidence from both parties' experts showed that there was a form of partisanship polarization in the Town elections studied; black voters support Democrats and white voters support Republicans. *See* McDonald (T351, T384, T413); Stanley (T1516-1517). However, both experts agreed that the presence of partisanship polarization did not negate the fact that racially polarized voting patterns also existed.

The court concluded that there was a strong correlation between political partisanship and the voting behavior of blacks and whites in the Town (Pet. 129a). However, it reasoned that "[i]t is possible for race-neutral factors, such as political partisanship, to co-exist with race-based ones, such as diminished access to the slating process or insensitivity by elected officials to the particularized needs of the minority community." *Id.* It explained that the fact that "divergent voting patterns may be logically explained by a factor other than race

(Cont'd)

premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. at 29, n.117, 1982 U.S.C.C.A.N. at 207, n.117.

does not end the inquiry, nor does it require Plaintiffs to prove racial bias in the community or that political parties in the Town serve as 'proxies' for racism" (Pet. 129a).

The court evaluated Petitioners' contention in the larger political and historical context in the Town. After immersing itself in this fact intensive process it concluded:

> In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic subdistricts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogenous population consisting of many different communities and voices, I conclude that the black citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics. Rather, black citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to elections and the slating of candidates for them are not equally open to the participation of blacks.

(Pet. 129a-130a).

Judge Gleeson held that the at-large election system violated Section 2 of the Voting Rights Act, and ordered defendants to submit a remedial plan dividing the Town into six single-member districts.

C. The District Court's Remedial Decision.

Petitioners submitted two alternative districting plans. The first was a two district plan under which black voters were placed into a single-member district and would elect one representative to the Town Board. The rest of the members of the Board would

be elected from a single multi-member district that *excluded* the black communities within the majority-minority district and included all of the white communities within the Town (Pet. 161a). The second was a six district plan that was essentially the plan proposed by Respondents at trial (Pet. 162a).

Finding the two district plan unconstitutional under the standards announced in *Shaw v. Reno*, 509 U.S. 630 (1993) ("Shaw I") and its progeny,[17] the court concluded:

> The sole basis for this extraordinary system — for this formal political division of the people in the Town of Hempstead — is race. There has been no attempt to justify if by reference to a single traditional districting principle. Although the Town Board makes passing reference to its belief that local government "operates better when elected officials must answer to the entire electorate," and to the preference in New York State for the "at-large system" of town government, . . . those principles obviously played no role in the proposed system. If the Town Board has its way, no member of the Town Board would "answer to the entire electorate," and none would be elected at-large.

(Pet. 148a) (footnotes omitted).

The court observed that

> [t]he segregation effected by the Town Board's two district plan is almost total. Ninety-seven percent of

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17. This Court has held that strict scrutiny applies to reapportionment plans that segregate voters solely on the basis of their race. *Shaw I*; *see also Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996). Under this line of cases, if it is demonstrated that race was the predominant factor in the creation of the plan, strict scrutiny applies, and if the plan is not narrowly tailored to serve a compelling state interest, the plan must be declared unconstitutional. *See Bush*, 116 S. Ct. at 1951.

> the black voters in the Town of Hempstead are placed in District 1, which has an overall population that is over 58 percent black. By contrast, District 2 (*i.e.*, the balance of the Town) is over 97 percent non-black.

(Pet. 148a, n.7). The court concluded that the two district plan could not survive the strict scrutiny test and rejected it (Pet. 155a), and it approved the six-district plan (Pet. 157a).

REASONS FOR DENYING THE WRIT

The chief defect in Petitioners' application is the representation that partisanship, as opposed to race, caused African-Americans to be excluded from effective political participation in Hempstead. This factual argument was soundly *rejected* by both the district court and the Second Circuit.

Judge Gleeson, following *Gingles* and its progeny, correctly ruled that evidence of partisanship is not dispositive of "legally significant white bloc voting"; rather, evidence of partisanship was properly considered as one relevant consideration in the "totality of circumstances" inquiry. With respect to that inquiry, the district court engaged in the requisite "searching practical evaluation of past and present reality." Its factual determination that the challenged at-large election system denied black residents of Hempstead an equal opportunity to nominate and elect candidates of their choice is fully supported by the record and is unimpeachable under the governing "clearly erroneous" standard. There is no disagreement amongst the Circuit Courts on the proper searching inquiry to be conducted and no court has ever adopted the bizarre argument Petitioners now proffer. At the remedy stage, the district court's rejection of the Petitioners' two-district plan was compelled, under strict scrutiny, by constitutional prohibitions against race-based gerrymandering.

I. The Clearly-Erroneous Standard Governs This Court's Review of The District Court's Factual Findings of Legally Significant White Bloc Voting And Minority Vote Dilution.

This Court has confirmed that the clearly-erroneous test of Fed. R. Civ. Proc. 52(a) is the governing standard for appellate review of a finding of vote dilution. *Gingles*, 478 U.S. at 78-80. The Voting Rights Act requires the trial court "to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted). Acknowledging that "[t]his determination is peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms" (internal quotation marks and citations omitted), this Court instructed:

> [T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

Gingles, 478 U.S. at 79.

Here, the district court properly immersed itself in an "intensely local appraisal of the design and impact of" the at-large voting system employed in the Town.[18] Its evaluation of the social and historical conditions in the Town and its related factual findings were all amply supported by the evidence before it. The court's ultimate factual finding that the Town's at-large system interacted with these conditions to cause an inequality

18. This Court has highlighted the "special vantage point" held by a district court, and has specifically expressed a disinclination to overturning such findings that represent "a blend of history and an intensely local appraisal of the design and impact of [the challenged] district in light of past and present reality, political and otherwise." *White v. Regester*, 412 U.S. 755, 769-70 (1973).

in the opportunities enjoyed by African-American voters to elect their preferred representatives, was firmly secured by a proper application of the governing law.

II. The District Court Properly Evaluated The Alleged Impact of Partisanship in The Totality of The Circumstances, And Its Finding That Black Citizens' Inability to Elect Their Preferred Candidates Is Best Explained by The Fact That The Political Processes Leading to Elections And The Slating of Candidates Are Not Equally Open Is Amply Supported by The Record.

The premise undergirding Petitioners' argument is that white bloc voting and racial polarization in the Town are not "legally significant" because partisan politics, not racial bias, best explains the black community's inability to elect its preferred candidates. No matter how they twist and turn, they cannot escape the fact that this *factual* argument has been rejected by both the district court[19] and the Second Circuit. Their argument that evidence of partisanship *dispositively* defeats any claim of "legally significant white bloc voting" at the threshold and precludes a district court from conducting a searching overall vote dilution inquiry finds no basis in any case and, indeed, violates the statute, the 1982 Senate Report, this Court's decision in *Gingles* and the premise underlying every circuit court case Petitioners have cited.

Furthermore, the adoption of Petitioners' proffered radical rule — that the existence of partisanship automatically precludes any possibility of finding "legally significant white bloc voting"

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19. The district court specifically found,

> [i]n evaluating all of the relevant facts as a whole, . . . black citizens' failure to elect representatives of their choice to the Town Board is *not* best explained by partisan politics. Rather, black citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to elections and the slating of candidates for them are not equally open to the participation of blacks.

(emphasis added) (Pet. 129a-130a).

— would defy this Court's *rejection* of "inflexible rules" such as this which "run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' " *Johnson v. DeGrandy*, 512 U.S. 997 (1994), *citing* 42 U.S.C. § 1973(b).

Petitioners' approach to the issue of "legally significant white bloc voting" has already been rejected by this Court in *Gingles*. There, the majority of this Court *agreed* that *whether* white voters cast their votes as a bloc sufficiently to defeat minority preferred candidates is the question to be determined for the purpose of assessing a plaintiff's proof of the third *Gingles* factor. *Gingles*, 478 U.S. at 55. The question of *why* voters voted for or against a particular candidate was not relevant to the proof of "legally significant white bloc voting." *Gingles*, 478 U.S. at 100 (O'Connor, concurring).

In Part III-C of his opinion, Justice Brennan asserted that "the *reasons* black and white voters vote differently have no relevance to *the central inquiry* of § 2." *Gingles*, 478 U.S. at 63 (emphasis added).[20] He stated, "[i]t is the *difference* between the choices made by blacks and whites — not the reasons for that difference — that results in blacks having less opportunity than whites to elect their preferred representatives." *Id.* (emphasis in original) The Justices who disagreed with Justice Brennan's analysis notably *agreed* with him that the reasons for these different choices could *not* be utilized to rebut a threshold showing that the minority group is politically cohesive and has prospects for electoral success (*i.e.*, the second and third *Gingles* factors). They *disagreed* with his assertion that such evidence could never affect the *overall* vote dilution inquiry (*i.e.* the central or ultimate inquiry of Section 2).

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20. A majority of this Court agreed that the central or *ultimate* inquiry of Section 2 is whether, based upon the "totality of circumstances," the challenged electoral structure impairs the ability of black voters to participate equally in the political process and to elect their preferred representatives. *Gingles*, 478 U.S. at 47.

In her concurring opinion, Justice O'Connor characterized Part III-C of Justice Brennan's opinion as addressing the validity of relying upon statistical evidence in finding racially polarized voting. Significantly she wrote:

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I *agree* that defendants *cannot rebut this showing* by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the *overall* vote dilution inquiry.

Gingles, 478 U.S. at 100 (emphasis added).

Justice O'Connor concluded that the "[*o*]*verall vote dilution* inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns." *Id.*, 478 U.S. at 100 (emphasis added). She agreed with Justice Brennan that statistical evidence of divergent racial voting patterns is sufficient to establish "legally significant white bloc voting," and that such a showing *cannot* be rebutted by reliance on evidence that suggests that the divergent voting patterns may be explained by non-racial considerations. However, Justice O'Connor maintained that the influence of such diverging interests could certainly affect the *ultimate* issue, in the totality of circumstances, of whether such bloc voting would consistently deprive the minority of the ability to elect their preferred representative. This is precisely how Judge Gleeson approached the issue (Pet. 123a-129a), and this is precisely how the various circuit courts have addressed the issue.

As the Second Circuit succinctly held in this case, citing *Gingles* and decisions from the First, Fourth, Seventh and Eleventh Circuits:

> We think the best reading of the several opinions in *Gingles*, however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, *see Gingles*, 478 U.S. at 62, 106 S.Ct. at 2772 (Brennan, J., plurality opinion) but relevant in the totality of circumstances inquiry, *see* 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J.), concurring in judgment) (agreeing that use of racial polarization data "solely" to prove *Gingles* second and third elements cannot be rebutted by "evidence that the divergent racial voting patterns may be explained in part by causes other than race," but disagreeing with plurality's claim "that such evidence can never affect the overall vote dilution inquiry."). *Lewis v Alamance County, N.C.*, 99 F.3d 600, 616 n.12 (4th Cir. 1996); *see also Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (reasons why candidates preferred by black voters lost should be considered in totality of circumstances inquiry); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (non-racial reasons for divergent voting patterns to be considered under totality of circumstances test); *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (in order for plaintiff to prevail where defendant offers proof that voting patterns can best be explained by non-racial circumstances, showing must be made under totality of circumstances that minority group denied meaningful access to political process).

Pet. 30a-31a.

There is plainly agreement among the Circuit Courts on this issue.[21] The Fifth Circuit Court of Appeals *also agrees* that

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21. Recently, in *Sanchez v. State of Colorado*, 97 F.3d 1303, 1313 (10th Cir. 1996), the Tenth Circuit too agreed that,

> if the third Gingles' precondition asks whether whites vote

(Cont'd)

inquiries into the relevance of non-racial explanations for white-bloc voting, such as partisanship, necessarily involves a review of the totality of circumstances. *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 860 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) ("LULAC") ("[t]he bloc-voting inquiry, like the question whether the political processes are equally open, must rest upon a searching practical evaluation of the past and present reality" [internal quotation marks omitted]).

Petitioners' argument that *LULAC* stands for the proposition that mere evidence of partisanship precludes inquiry into other reasons for divergent voting patterns is precisely the opposite of what the Fifth Circuit held in that case. There, faced with evidence demonstrating that the majority Republican Party had "aggressively recruited minority lawyers to run on their ticket" (999 F.2d at 861), and finding no evidence of unresponsiveness on the part of elected officials (999 F.2d at 859), a majority of the judges of the Fifth Circuit concluded that "[t]he *record* before us contains *no evidence* that past or present discrimination has affected minorities' political access in any way." 999 F.2d at 853 (emphasis added). The Fifth Circuit also remarked, "[T]estimony shows that any eligible candidate could run as a Republican regardless of race. The plaintiff-intervenors testified themselves that they had been heavily lobbied by the Republican Party leadership to run on the Republican ticket." *LULAC*, 999 F.2d at 880.

It is eminently clear from the Fifth Circuit's *factual determination* that partisanship best explained plaintiffs'

(Cont'd)

> sufficiently as a block to enable them usually to defeat the minority candidate, it is asking how voters vote, not why voters voted that way. Indeed, the searching evaluation done in the totality of circumstances perhaps reveals the answer to the latter question. However, at the threshold, we are simply looking for proof of the correlation between the race of the voter and the defeat of the minorities' preferred candidate.

political losses, that the court reached this conclusion only after assessing *that entire record. See, LULAC*, 999 F.2d at 855 ("[i]t is difficult to see how the record in this case could possibly support a finding of liability"); 999 F.2d at 860 ("[w]e fully agree with the plaintiffs that the bloc voting inquiry, like the 'question whether the political processes are "equally open," ' must rest 'upon a searching practical evaluation of the "past and present reality." ' "); 999 F.2d at 861 ("[b]ecause the evidence in most instances unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation, we conclude that plaintiffs have failed to establish racial bloc voting in most, but not all, of the counties").

Petitioners' contention that this Court's decision in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) is somehow dispositive of this case (Pet. 22-24), stems from their continued evasion of the facts. In *Whitcomb*, this Court rejected plaintiffs' contention that a challenged districting plan for the State of Indiana invidiously discriminated against them in violation of the Fourteenth Amendment. This Court stressed that the record contained *no evidence* or district court *findings* that plaintiff "ghetto residents had less opportunity than other Marion County residents to participate in the political processes and to elect legislators of their choice." *Whitcomb*, 403 U.S. at 149. Indeed, the record there demonstrated that Democrats, including "ghetto" residents, had not only been elected in one of five studied elections, but that the Republicans in Marion County, who won the other four elections, slated and elected representatives from the "ghetto" community. *Whitcomb*, 403 U.S. at 152. Significantly, Justice White indicated that, "there was no finding by the District Court that Republican legislators residing in the ghetto were not representative of the area or had failed properly to represent ghetto interests in the general assembly." *Whitcomb*, 403 U.S. at 152, n.32. Notably, 20 years later, writing in *Shaw v. Reno*, 113 S. Ct. 2816, 2835 (1993) (emphasis added), Justice White recalled, "In *Whitcomb v.*

Chavis . . . , we searched in vain for evidence that black voters 'had less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice.' "

These facts, stand in stark contrast to the situation in Hempstead, where minority-preferred candidates have *never* been elected, where the Republican Party has *never* nominated any minority community resident for a seat on the Town Board, and where the district court found that the sole "black" Republican member of the Town Board, Curtis Fisher, has *not* represented or been sufficiently sensitive to the interests of black residents (Pet. 118a-123a).

III. The District Court Properly Found That Petitioners' Two-District Remedy Violated The Fourteenth Amendment.

Petitioners' contention that the district court improperly rejected their admittedly unusual two-district remedy as an impermissible racial gerrymander in violation of the principles set forth in *Shaw v. Reno*, 509 U.S. 630 (1993), is insupportable. Under the Petitioners' proposal, the Town was to be divided into two separate districts (Pet. 136a), and as the court observed, "[t]he segregation effected by the Town Board's two-district plan is almost total." (Pet. 148a, n.7).

Judge Gleeson appropriately analyzed the motivation behind the Town's creation of its segregationist two-district plan, as required by *Bush v. Vera*, 116 S. Ct. 1941, 1951 (1996), and concluded that, "The sole basis for this extraordinary system — for this formal political division of the people in the Town of Hempstead — is race. There has been no attempt to justify it by reference to a single traditional districting principle" (Pet. 148a).

Accordingly, the court concluded that "strict scrutiny must be applied to the two-district plan because race is not merely the predominant factor motivating the classification of the voters, it is the *only* factor" (Pet. 149a, emphasis in original). In light of its finding, the court considered whether the plan was narrowly tailored to meet a compelling state interest. While the

court concluded that remedying a Section 2 violation was a compelling state interest, the court decided that:

> The two-district plan clearly fails to meet this requirement. [A] majority-minority district can readily be created in the Town even if race is subordinated to the traditional districting principles of one-person, one-vote, compactness, and conformance with existing political geography. The plan plaintiffs proposed at trial accomplished that result, as does the six-district plan proposed as an alternative by the Town Board. In light of the ready availability of these remedies, there was no need to create the bizarre hybrid two-district electoral plan the Town Board proposed, and it is difficult to fathom why the Town Board would strain so hard to create such a divisive proposal. In any event, the unusual characteristics of the two-district plan defeat any claim that the proposed plan is narrowly tailored to remedy the Section 2 violation. I reject it as violative of the Fourteenth Amendment.

(Pet. 154a-155a, citation and footnote omitted)

The court stated that the two-district plan would "punish the black communities by isolating them and their elected representative" (Pet. 153a). Perhaps most troubling was Judge Gleeson's conclusion that:

> [T]he trial testimony leads me to conclude that it is *designed* to facilitate a concrete harm as well. Specifically, the creation of the unusual multi-member district for the remainder of the Town appears *designed* to enhance the ability of the Town Board to act as the Town Supervisor predicted it would act if plaintiffs prevailed in this case: parochially, in ways that will permit it to do the "wrong thing" politically with respect to the newly-created "zone."

(Pet. 153a, citation omitted, emphasis added). In light of the district court's careful application of the appropriate legal standard, Judge Gleeson properly rejected the two-district plan.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

RANDOLPH M. SCOTT-MCLAUGHLIN
Counsel of Record
78 North Broadway
White Plains, NY 10603
(914) 422-4340

FREDERICK K. BREWINGTON
LAW OFFICES OF
FREDERICK K. BREWINGTON
50 Clinton Street, Suite 501
Hempstead, NY 11550
(516) 489-6959

RICHARD HAMBURGER
DAVID N. YAFFE
HAMBURGER, MAXSON & YAFFE, LLP
225 Broadhollow Road, Suite 404W
Melville, NY 11747
(631) 694-2400

Attorneys for Respondents

APPENDIX

APPENDIX — EXCERPTS FROM THE MAY 1982 SENATE JUDICIARY COMMITTEE REPORT ON THE VOTING RIGHTS ACT AMENDMENTS OF 1982 (S. Rep. No. 417, 97th Cong., 2d Sess., at 28-30 [1982])

Following are the so-called Senate Factors provided in the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act:

> Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy.
>
> If as a result of the challenged practice of structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this Section. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.

Typical factors include:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

Appendix

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

1. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. [FN116]

Appendix

2. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. [FN117]

While these enumerate factors will often be the most relevant ones, in some cases, other factors will be indicative of the alleged dilution.

The cases demonstrate, and the committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.